

IN THE HIGH COURT OF ZANZIBAR

HELD AT TUNGUU

CRIMINAL APPEAL NO. 34 OF 2024

(FROM CRIMINAL CASE NO. 80 of 2022)

YUSSUF MOH'D SHELA APPELLANT

VERSUS

DPP RESPONDENT

JUDGMENT

Dated 5th November, 2024

BEFORE: K. SHAMTE J.

This is an appeal against the decision of the Regional Court Vuga in Criminal Case No. 80 of 2022 in which the Appellant's appeal against his conviction for defilement was considered. The facts of the case are concise and unambiguous. The victim of the defilement was a child aged 9 years. On the day in question, the victim was instructed to dispose of waste and other products. The Appellant subsequently restrained the victim's mouth and forcibly removed him from their house, and finally defiled the victim. Upon the victim's return, his mother observed that he was unclothed and bleeding to his mouth. When questioned about the perpetrator, the victim identified the Appellant by the nick name "Kitale".

The Appellant's conviction was predicated on the testimonies of the victim, the victim's mother, and on the PF3, which was tendered in court as exhibit PE1. The Regional Magistrate convicted the Appellant on both counts and imposed sentences of ten years in the Education Centre for the first count and life imprisonment in the Education Centre for the second count. Both sentences were ordered to run concurrently.

Aggrieved by the conviction and sentence, the Appellant presented eight grounds of appeal, which have been summarised into two main grounds as follows:

1. That the learned Trial Magistrate erred in law and fact in assuming that he had jurisdiction to determine criminal case No. 80 of 2022 without it being assigned to him, thereby rendering the entire proceedings null and void.



2. That the trial court erred in law and fact by convicting the Appellant based on insufficient evidence from prosecution witnesses.

During the hearing, the Appellant was represented by Counsels Rajab Abdallah Rajab and Mwanaidi Abdallah, whilst the Respondent was represented by the Principal State Attorney, Mohamed Saleh Iddi. The Appellant presented eight grounds of appeal. In his oral submission, Mr. Rajab merged the second, third and eighth grounds, and combined the first, fourth and fifth grounds of appeal respectively. Furthermore, Counsels Rajab withdrew grounds six and seven.

Addressing the second, third and eighth grounds of appeal collectively, Counsel Rajab contended that their case was tried by three different magistrates. He noted that no rationale had been provided or communicated to the parties regarding the alleged transfer of the case from one magistrate to another. Counsel Rajab elucidated that the case was initially presided over by Hon. Sarah (RM), subsequently reassigned to Hon. Omar M. Hamza, and ultimately concluded by Hon. Nayla.

Referring to page 15 of the court proceeding, Counsel Rajab submitted that there is a statement indicating the Appellant was notified; however, there is no evidence of such transfer. This action contravenes sections 95 and 96 of the Criminal Procedures Act (CPA), No. 7 of 2018. In conclusion, Counsel Rajab asserted that the implications of proceeding with the case without proper assignment were established in the Court of Appeal of Tanzania in **Sefu Snayo V. Republic**, Criminal Appeal No. 477 of 2019, under similar circumstances. It was determined that providing reasons for case transfer is mandatory, and the appropriate remedy is to nullify the proceedings and order the matter to start de novo. Another case referenced by Counsel Rajab is **Diamond Trust Bank Ltd V. Idrisa Shehe**, Civil Appeal No. 262 of 2017, wherein the judge entertained the case without proper assignment. Furthermore, the High Court of Zanzibar rendered the same decision in **Shaibu Hussein Shehe V. DPP**, Criminal Appeal No. 42 of 2022. Counsel Rajab prayed the court to order the case to commence de novo.

Regarding the first, fourth, and fifth grounds of appeal, Counsel Rajab submitted that the case was fabricated and the position was inaccurate. He referred to page 5 of the court proceedings, specifically PW1's testimony, which stated that Kitale was present at the location with the intention of stealing, and there is no instance where he was identified as the person who defiled the victim.

Furthermore, Counsel Rajab contended that PW2's testimony is of questionable validity, as it was provided without taking an oath, and the records do not indicate whether she was duly testified. Additionally, there is no record that PF3 was read over and the contents were comprehended.

Regarding the excessive sentence as mentioned in the fifth ground, Counsel Rajab referred to the judgement on page 8 and argued that the Appellant, being a first-time offender, was sentenced to life imprisonment. He was convicted and sentenced to 10 years for the first offence and life imprisonment for the second offence, without any apparent consideration. Counsel Rajab concluded by requesting that the appeal be allowed and the Appellant be released, unless otherwise lawfully held.

PSA Mohamed, in response to the grounds of appeal, strongly opposed them and addressed the grounds as they were consolidated by the learned Counsel. Concerning the first three grounds, he directed this court to the charge sheet, which was admitted by Hon. Sarah, and argued that the trial magistrate's signature on the charge clearly indicates that the case was assigned to her.

In his reply submission, PSA Mohamed did not dispute that the magistrate had ever been registered in the proceedings of the trial court but further argued that such transfer did not affect the proper recording of the proceedings and trial of the case. In his view, such transfer did not result in a failure of justice to the parties.

To substantiate his grounds, he cited the case of **Charles Yona V. Republic**, Criminal Appeal No. 79 of 2019 on page 13, where the court addressed the two questions as to whether the court was vitiated by non-compliance and if materially prejudiced, and dismissed the appeal on page 15 of the judgement.

Regarding the transfer to Hon. Omar Mcha, he submitted that pages 14 and 15 of the court proceedings, indicated that the file was assigned to him in the absence of Hon Sarah. He argued that the records prove that the case was properly transferred, and sections 95, 96 and 204 of the CPA are complied with. PSA Mohamed added that whether the law prejudice the right of the accused as the matter be tried denovo, his submission, proved that the provisions don't affect the right of the accused, and the case was determined by the Magistrate who have the powers to do so, and the accused has been provided with all his rights to be heard, cross examine and defence.

Cementing his grounds he cited the case of **Charles Yona V. Republic**, Criminal Appeal 79 of 2019 on page 13, where the court addressed the two questions as the court was vitiated by non-compliance and if materially prejudice and dismiss the appeal on page 15 of the judgment.

He concluded his submission by asserting that the omission can be rectified under section 381 of the CPA, which allows for the correction of errors and omissions that may result in a failure of justice. He again referenced the case of Charles (supra) and contended that the errors and omissions were remedied. He prayed the court to dismiss these grounds, arguing that there is no necessity for a de novo trial in this case.

Regarding the first, fourth and fifth grounds, PSA Mohamed referred to page 5 of the court proceedings on the testimony of PW1 and argued that, as the key witness, PW1 provided a comprehensive account of the events, including how he was taken by the accused to the area of the scene and subsequently returned. He further noted that PW1 identified the accused by his nickname, his unethical behaviours, and using his first, second and last names. He emphasized that PW1's evidence was sufficiently credible and corroborated by other evidence.

Based on this, PSA Mohamed referenced the testimony of PW4, which detailed the discovery of indicative signs on PW1 after he had been defiled. To support his chronological presentation of events, he cited the case of **Emmanuel Samuel @ Noel V. Republic**, Criminal Appeal 304 of 2021 on page 10, where the credibility, consistency, and coherence of witness testimony were analysed.

Regarding the evidence of PW2 on page 6 of the court proceedings, which was not supported by any sworn statement, PSA Mohamed concurred with Counsel Rajab that there is no evidence that PW2 was sworn in before providing testimony, which contravenes section 180 of the CPA. He requested the court to expunge PW2's statement and retain the testimony of PW1, which constitutes credible evidence. To substantiate these grounds, he cited the case of **Joseph Haidan Moyo V. Republic**, Criminal Appeal No. 644 of 2022, on pages 7 to 9, wherein the court deliberated on issues of failure to cross-examine and the party's preclusion from raising the matter on appeal.

Subsequently, PSA Mohamed referred to the evidence of PW4 (a doctor) and submitted that the content of the document (PF3) was not read over but was admitted into the records. PSA Mohamed argued that if the document is not read over, the court may expunge it and consider the oral

evidence of PW4 as a professional doctor. He petitioned the court to dismiss the grounds and rule that the evidence is sufficient to convict the Appellant.

Regarding the final ground concerning the sentence, PSA Mohamed argued that the High Court, as the first appellate court, possesses the authority to intervene in the sentencing. He referenced the case of **DPP V. Focus Patric Munishi**, Criminal Appeal No. 672 of 2020 on pages 7 to 8, where the Court of Appeal delineated the circumstances under which the first appellate court may intervene in sentencing. He petitioned for the appeal to be dismissed, with the sentence and conviction to remain undisturbed.

In his brief rejoinder, Counsel Rajab maintained that the transfer was not executed in accordance with proper procedures, and the admission of charge could not substantiate this claim. He further directed attention to pages 14 and 15 of the court proceedings, wherein the assignment to Hon. Omar Mcha was implemented by himself rather than the presiding magistrate, and subsequently prayed the case being started denovo.

In determining this appeal I will start with the ground of appeal where the jurisdiction of the learned magistrate Hon. Sarah and Hon. Omar Mcha to entertain the application is put to question. Upon examination of the Regional Court record and the submissions by both learned legal representatives for the parties, this appeal shall start with the ground of appeals wherein the jurisdiction of the learned magistrates Hon. Sarah and Hon. Omar Mcha to entertain the application is questioned. The court further will examine the alleged improper assignment of the case file to them, as per the requirements of sections 95 and 96 of the CPA.

Counsel Rajab's contention on this matter originates from the initial assignment to Hon. Sarah who, according to the original and typed proceedings on page 1 dated 9th June 2022, read over the charge in the case file Criminal Case No. 80 of 2022. The case came for hearing before her on 22nd June, 2022 before being heard by Hon. Omar Mcha on 1st November, 2022 without any stated reason for the transfer. Subsequently, the file was moved to Hon. Nayla on 15th March, 2023, where the reason was clearly indicated.

Section 95 of the CPA pertains to powers to transfer cases between magistrates by Magistrate in charge. Regarding the issue of case file transfer, the provisions of section 95 and 96 of the CPA have established procedures. The intention of this legal provision is to promote transparency and minimise disorder in the administration of justice,

thereby enhancing the integrity of judicial proceedings. This principle was affirmed in the case of **Priscus Kimaro V. Republic**, Criminal Appeal no. 301 of 2013 (CAT-unreported), wherein the Court observed:

".....where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with to the detriment of justice. This must not be allowed."

This Rule stipulates that there must be an order of transfer, which specifies the individual assigned and the rationale for the transfer. In the present case, this order is absent. The Court of Appeal in **Bahati s/o Mdobofu V. Republic**, Criminal Appeal No. 8 of 2013 (unreported) reiterated the statement made in **Salim Hussein V. Republic**, Criminal Appeal No. 3 of 2011 that:

"We only wish to emphasise here that under this section, the subsequent magistrate can assume the jurisdiction to "take over and continue with the trial ... and act on the evidence recorded by his predecessor" only if the first magistrate "is for any reason unable to complete the trial" at all or "within a reasonable time". Such reasons must be explicitly shown in the trial court's record of proceedings."

Furthermore, the Court in **Bahati s/o Mdobofu V. Republic** (supra) stated:

"In view of the settled position of the law, in the absence of the reason for the change of magistrate and failure to inform the appellant on his rights to have the trial continued or start afresh and witness recalled, section 214 (1) of the CPA was violated. As such, the trial was not fairly adjudicated and there was a miscarriage of justice on the part of the appellant".

It is pertinent to refer to the case of **Oysterbay Villas Limited V. Kinondoni Municipal Council**, Civil Appeal No. 173 of 2017 (CAT-unreported) where the Court of Appeal emphasised the importance of documenting the reasons for transferring a case file from one judge or magistrate to another in the proceedings of the case file. The duty imposed on the successor judge and magistrate and the reasons thereof were elucidated in the case of **M/S. Georges Centre Limited V. The Honourable Attorney General**, Civil Appeal No. 29 of 2016 (CATunreported) which stated:

"The general premise that can be ascertained from the aforementioned provision is that once the trial of a case has commenced before one



judicial officer, that officer is obligated to bring it to completion unless circumstances prevent them from doing so. The cited provision imposes upon a successor judge or magistrate an obligation to document the rationale for assuming a case that has been partially heard by another.”

It is a common principle that the Regional Magistrate who had not been assigned the case file lacked jurisdiction to entertain and preside over the matter, as they could not have legally done so without an order of transfer in their name. This principle was established in **Frank Lukas Ntende V. Republic**, Criminal Appeal No. 266 of 2019, and **Nasra Hamis Hassan V. Republic**, Criminal Appeal No. 545 of 2017.

The issue before the court for determination is whether the re-assigned magistrates Hon. Sarah and Hon. Omar Mcha were required to provide reasons for their reassignment. In the present appeal, the case was partially heard by Hon. Sarah before reassignment to Hon. Omar Mcha. As per the Court of Appeal’s decision, reasons for reassignment are primarily relevant when a case is partially heard. Consequently, Hon. Omar was duty-bound to provide reasons for assuming adjudication of the case from Hon. Sarah. The absence of stated reasons for such transfer suggests that the case file was not properly reassigned to any other magistrate, and that the other magistrate lacked jurisdiction to determine the case due to improper assignment. This renders all proceedings that continued without proper reassignment null and void.

Thus, the first issue in this appeal is hereby sustained. In view of the above finding this Court is of the view that this finding is enough to make this case a mistrial and the Court will not proceed with the remaining grounds of appeal. Therefore, the appeal is allowed and it is ordered that there will be a trial de novo. Accordingly, I hereby invoke revisionary powers under section 381 of the CPA, to nullify the proceedings before Hon. Sarah and Hon. Omar Mcha, and the consequent orders issued in Criminal case No. 80 of 2022 before the Regional Court Vuga. I quash the judgment and conviction of the Appellant and set aside the sentence of imprisonment for ten years and life imprisonment imposed on him.

It is so ordered.


KHADIJA SHAMTE
JUDGE

5th November, 2024

